No. 85-1066

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCT. TERM, 1985

JAMES G. MARTIN, *et al.*,

Appellants,

v.

TERRY L. HAITH,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. **Whether this Court's decision in *Allen v. State Board Elections*, 393 U.S. 544 (1969), should be extended to cover a state's judiciary?**

II. **Whether past changes in North Carolina's judiciary must now be precleared pursuant to §5 of the Voting Rights Act, in light of the special circumstances of this case?**

PARTIES TO THE PROCEEDINGS

The appellants, defendants in the proceedings below, are James G. Martin, in his capacity as the Governor of the State of North Carolina; Lacy H. Thornburg, in his capacity as Attorney General of the State of North Carolina; Thad Eure, in his capacity as Secretary of State of the State of North Carolina; The State Board of Elections of North Carolina; Robert N. Hunter, in his official capacity as Chairman of the State Board of Elections, Ruth Semashko, Robert F. Browning, William A. Marsh, Jr. and Margaret King, in their official capacities as members of the State Board of Elections.

The Appellee, Plaintiff in the proceedings below, is Terry L. Haith, a black resident and registered voter of the State of North Carolina.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The September 27, 1985, Order and Memorandum Opinion, entered in *Haith v. Martin,* No. 84-1319-CIV-5, by the three-judge panel are set forth in the accompanying Appendix A and Appendix B.

JURISDICTION

On November 27, 1984, Plaintiff below, a black resident and registered voter of North Carolina, filed a complaint for a declaratory judgment that certain enactments by North Carolina's General Assembly which affected the State's judiciary were being enforced in violation of §5 of the Voting Rights Act of 1965, as amended, 42 USC 1973c, and for an order enjoining the State from conducting elections pursuant to said enactments until submitted and precleared pursuant to §5. On February 27, 1985, Plaintiff amended its complaint to include numerous additional enactments which had not received preclearance. A statutory three-judge court was convened as required by 28 USC §2284 and 42 U.S.C. § 1973c.

Plaintiff filed motion for summary judgment on the §5 issues presented by the case and the State filed cross-motion for summary judgment. The State herein appeals from the District Court's granting of summary judgment on September 27, 1985, against the State. Notice of Appeal was filed in that Court on October 7, 1985. Jurisdiction is conferred on this Court by 28 USC §1253 and 42 USC §1973c, to hear any appeal from an action under 42 USC §1973c. *NAACP v. New York,* 413 U.S. 345, 353-56 (1973).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and enactments, as set forth below, are set forth in Appendix G.

U.S. Const. Amend XIV

U.S. Const. Amend XV

42 U.S.C. §1973

42 U.S.C. §1973c

Chapter 262, North Carolina Session Laws of 1965

Chapter 997, North Carolina Session Laws of 1967

Chapter 1119, North Carolina Session Laws of 1977

Chapter 1130, North Carolina Session Laws of 1977

Chapter 1238, North Carolina Session Laws of 1977

Chapter 1109, North Carolina Session Laws of 1983

STATEMENT OF THE CASE

This appeal arises from an action brought by Plaintiff below to obtain declaratory relief and to enjoin the further enforcement of certain North Carolina statutes relating to the election of superior court judges unless and until those statutes are submitted to the United States Attorney General and approved in accordance with the provisions of §5 of the Voting Rights Act of 1965, as amended, 42 U.S.C §1973c.

It was alleged that the following enactments of the General Assembly of North Carolina are currently in force, in violation of §5:

Chapter 262, Session Laws of 1965

Chapter 997, Session Laws of 1967

Chapters 1119, 1130, and 1238, Session Laws of 1977

Chapter 1109, Session Laws of 1983

Each of these acts was passed subsequent to November 1, 1964. The Voting Rights Act of 1965 requires that all changes in any "standard, practice, or procedure with respect to voting" occurring in a jurisdiction covered by the Act after November 1, 1964, be approved by the United States Attorney General or by the United States District Court for the District of Columbia.

Following November 1, the North Carolina General Assembly enacted Chapter 262, Session Laws of 1965. The act amended N.C.G.S. §163-147 (now §163-106(d)) by requiring judicial candidates in multi-seat districts to designate the seat for which they run.

In 1967, the General Assembly passed Chapter 997, Session Laws of 1967, which provided additional resident superior court judges for certain judicial districts. These added judgeships were filled for full 8-year terms, which thus created staggered terms for the judges in each of the above districts. In 1977, the General Assembly again added judgeships seats, again with staggered terms, to other districts. (Chapter 1119, Session Laws of 1977.)

Also in 1977, Chapters 1130 and 1238 split some judicial districts. In 1983, the General Assembly added new superior court judges, for staggered terms, in still more districts. (Chapter 1109, Session Laws of 1983.)

The State admitted that Chapters 1119, 1130, and 1238 of the Session Laws of 1977 and Chapter 1109 of the Session Laws of 1983 had not been precleared. The State contended that Chapter 997 of Session Laws of 1967 and Chapter 262 of Session Laws of 1965 had been precleared because of inclusion of their provisions in later enactments of the General Assembly which were submitted to the Attorney General and approved.

The State further contended that its actions with respect to each of the foregoing enactments had been taken in response to representations made by the United States Attorney General to

> This so-called "preclearance" requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a "substantial departure...from ordinary concepts of our federal system"; its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care.

Sheffield, supra, 435 U.S. at 141 (Stevens, J., dissenting) (footnote omitted).

The examination of any statute must begin with its words. Section 5 requires preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." The District Court did not conclude that North Carolina's reorganization of its judicial system constituted a "voting qualification or prerequisite to voting"; rather the Court found these statutes to constitute a "standard, practice, or procedure." App. at A-5. Clearly, *Allen* gave a broad construction to that phrase. However, on its next occasion to consider the statute, this Court found it necessary to adopt a limiting construction. The Court concluded that "§5 was designed to cover changes having a potential for racial discrimination in voting." *Perkins, supra,* 400 U.S. at 388-89. Cf. *id.,* at 398 (Harlan, J., concurring in part and dissenting in part). This Court continues to adhere to that standard in judging the scope of the statute. "Thus, in determining if an enactment triggers §5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Doughtery County, Georgia, Board of Education v. White,* 439 U.S. 32, 42 (1978) (emphasis in original).

To determine whether a change has the potential for discrimination, the language of the statute itself again must be examined. To obtain approval under §5, a jurisdiction must demonstrate that a "standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." It is immediately apparent that no North Carolina citizen could possibly have his right to vote denied by the modifications of the judicial system enjoined by the District Court in this case. The

question to be determined, then, is whether North Carolina's statutes have the potential for "abridging the right to vote on account of race or color."

The meaning of this phrase was carefully explained by a leading voting rights practitioner to a House Judiciary Subcommittee in 1975:

> I think section 5 deals with situations where the right to vote is abridged, which includes a dilution, and abridgement is specifically by the [15th] amendment. And I think what we are talking about under section 5 is specifically situations where the operation of a voting change is bringing about a dilution, or abridgement of the vote, based on race ... .

Hearings on H.R. 939 et al. before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 636 1975 [hereinafter cited as 1975 House Hearings] (testimony of Armand Derfner). This description of the reach of § 5 is fully consistent with this Court's precedents. The concept of dilution stems from this Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). This decision was well known to Congress in 1965, and this Court held in *Allen, supra*, 393 U.S. at 569, that Congress intended to incorporate the broad concepts of voting set forth in that decision. Accord, *Georgia, supra*, 411 U.S. at 532-33; *Perkins, supra*, 400 U.S. at 390. Indeed, it is to *Reynolds* that the authors of the Senate Judiciary Committee Report looked in setting forth the scope of the most recent amendments to the Act. S. Rep. No. 417, 97th Cong., 2d Sess. 19-27 (1982) [hereinafter cited as 1982 Senate Committee Report). See also Blacksher & Menefee, "At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution," in C. Davidson, *Minority Vote Dilution*, 203, 207-21 (1984); parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 718-719 (1983).

In all the judicial opinions and all the legislative history generated during the twenty-year history of the Act, there is not a single suggestion that the concept of abridgement is more inclusive than the concept of dilution set forth in *Reynolds* and its progeny. It was clear by the time Mr. Derfner testified to the House Subcommittee in 1975, if not before, that the rule of *Reynolds* did not encompass a State's decisions with regard to the structure of its judiciary. "The Louisiana constitutional provisions, which this Court today upholds against appellants' renewed constitutional attack, provide for the election of the State's Supreme Court Justices from election districts that are established without regard to population." *Wells v. Edwards,* 409 U.S. 1095 (1973) (White, J., dissenting), aff'd, 347 F. Supp. 453 (M.D. La. 1972). The District Court's decision, which this Court affirmed, held "that the concept of one-man one-vote apportionment does not apply to the judicial branch of the government." 347 F. Supp. at 454. Just weeks before, this Court had summarily affirmed a holding of another District Court "that the one-man, one-vote does not apply to the State Judiciary." *Holshouser v. Scott,* 335 F. Supp. 928, 932 (M.D.N.C. 1971), aff'd, 409 U.S. 807 (1972). See also *Buchanan v. Rhodes,* 249 F. Supp. 860 (N.D. Ohio), *app. dismissed,* 385 U.S. 3 (1966). Indeed, Congress may well have been aware of the limitations upon the *Reynolds* rule as early as its initial consideration of the Act in 1965. Although this Court had not yet spoken on the subject, the only federal Court to do so had held that "the one-man one-vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary." *Stokes v. Fortson,* 234 F. Supp. 575, 577 (N.D. Ga. 1964).

The rationale of these decisions is immediately apparent. *Reynolds* addressed itself to the problem of assuring equal representation for all citizens in multi-member legislative bodies. One way to do that, as the Court had recognized in the context of State Congressional delegations, is through at-large elections. *Wesberry v. Sanders,* 376 U.S. 1, 8 & n.11 (1964). As a practical matter, however, jurisdictions as large as States must elect their governing bodies from districts. As this Court noted in *Reynolds:*

> Legislators represent people, not trees or acres.... And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes

> of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.

377 U.S. at 562-63 (footnote omitted). The Court concluded, "But the basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives." *Id.*, at 567.

In the context of §5, this Court has found it important to consider whether a governing body "fairly reflects" minority voting strength. *City of Richmond. v. United States*, 422 U.S. 358, 371 (1975). *Cf.*, Proposed 23 C.F.R. §51.59(c)(3), 50 Fed. Reg. 19132 (May 6, 1985). Congress acknowledged the representative nature of this branch of the *Reynolds* doctrine when it amended §2 of the Act in 1982 to guarantee that all classes of citizens should have equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973(b). *Cf., White v. Regester*, 412 U.S. 755, 766 (1973). *See generally* 1982 Senate Committee Report, *supra*, at 27-31.

Judges, on the other hand, "are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes, supra*, 234 F. Supp. at 577. Population is not the only important consideration in constructing a judicial system. As the District Court held in *Buchanan, supra:*

> Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system.

249 F. Supp. at 865. The distinction between judges and representatives was further explained in *Holshouser, supra:*

> These judges are hybrid officials with both local and statewide functions and authority. The requirement that

> he reside from the district in which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and he may be assigned beyond his division by the Chief Justice.

335 F. Supp. at 933.

Unlike representative bodies, trial judges do not make collective decisions. A segment of the electorate can be neither overrepresented nor underrepresented in the mind of a trial judge. His duty is to apply the law as best as he can, and the race, sex, or geographical location of his colleagues enters into the balance not at all. The only possible complaint that a voter could have is that an insufficient number of judges of a particular race have been elected under a particular election system.

It is precisely this complaint which has been repeatedly rejected by Congress and this Court. "But this right to equal participation in the political process does not protect any 'political group,' however defined, from electoral defeat." *City of Mobile v. Bolden,* 446 U.S. 55, 77 (1980) (Opinion of Stewart, J.). Accord, *Whitcomb v. Chavis,* 403 U.S. 124, 156-57 (1971). This viewpoint was fully adopted by Senator Dole in explaining his proposed compromise, which has now become §2 of the Act: "It was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles upon which our society is based." 1982 Senate Committee Report, *supra,* at 193 (aditional views of Sen. Dole). Accord, *id.,* at 68; *is.,* at 197 (supplemental views of Sen. Grassley); H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 30 (1981). Just as "a defendant has no right to demand that members of his race be included on the grand jury." *Alexander v. Louisiana,* 405 U.S. 625, 628 (1972), a voter has no right to demand that members of his race be included on the bench. The law requires, not a white judge or a black judge, but a fair judge.

In short, the concept of dilution simply has no place on the trial bench. Lower courts had so held when Congress considered the Voting Rights Act in 1965 and 1970, and this Court had so held by the time of its reconsideration in 1975 and 1982. It is simply

inconceivable that Congress intended to instruct the Justice Department or the District Court for the District of Columbia to search for signs of dilution in a judicial system where this Court had held that no dilution could exist. Certainly, this Court cannot so hold "without more specific legislative directions." *City of Richmond, supra,* 422 U.S. at 371.

Thus, it is entirely beside the point that Congress made no explicit exception from §5 for the judiciary. There would have been no need to exclude the judiciary from a theory of law in which it had never been included in the first place. Indeed, it is not unprecedented for this Court to conclude that Congress intended not to include the judiciary within the reach of even the most beneficent remedial statute. In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court held that judges were entitled to absolute immunity from actions brought under 42 U.S.C. §1983. As the Court reasoned, "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.,* at 554-55 (footnote omitted). By the same token, the exclusion of the judiciary from the dilution doctrine of *Reynolds* has been well established by this Court's own precedents, and it is proper to assume that Congress would have specifically so provided had it intended to bring the courts within the scope of that doctrine.

This Court has often referred to the "contemporaneous administrative construction of the Act", *Sheffield, supra,* 435 U.S. at 131, by the Justice Department in determining the reach of its provisions. *See also Perkins, supra,* 400 U.S. at 390-94. The Department's contemporaneous construction clearly appears in the record of this case. In 1971 the North Carolina State Board of Elections had actually submitted to the Justice Department certain statutes involving changes in the judicial system. Acting Assistant Attorney General David L. Norman replied, "I must advise you that there were several statutes submitted, such as the changes in the North Carolina court system, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act." App. at A-49. A further explanation of the Department's view of Section 5 was provided by the Affidavit of former Assistant Attorney General Jerris Leonard, App. at A-13:

> Included among the doubts and concerns was whether or not § 5 of the Voting Rights Act of 1965 applied to judicial and prosecutorial districts and elections, as these offices were not representational in the context of members of the state legislatures, common councils, county boards and commissions.

In reviewing Mr. Norman's letter, Mr. Leonard concluded, App. at A-13:

> [S]uch position taken by Norman could easily be read, in light of its context, to exclude the necessity of submitting legislation relating to the voting districts, terms of office, etc., of judges and/or prosecutors (solicitors). Such a determination was, in fact, not inconsistent with positions taken by the Department of Justice at or about that period of time.

There is nothing in the record of this case to suggest that the Justice Department has changed its view since 1971. Indeed, the State is aware of no published record anywhere to suggest that the Department has changed its view. The rules implementing §5 are found at 28 C.F.R. Part 51, and neither the current rules, nor the proposed amendments, 50 Red. Reg. 19122-34 (May 6, 1985), give any explicit indication that the judiciary is covered by the Act When Congress reconsidered the Act in 1981 and 1982, the Justice Department provided a list of every objection ever entered under §5. Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 1746-82 (1982) [hereinafter cited as 1982 Senate Hearings]. Only once, in 1980, does it appear that the Department objected to a change involving the judiciary, and that objection was promptly withdrawn. *Id.*, at 1769. The Department also provided, for the benefit of the House Judiciary Committee, summaries of all of its voting rights litigation throughout the history of the Act, none of which involved the judiciary in any way. Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 2442-2575 (1981).

In adhering to its decision in *Allen*, this Court has repeatedly relied upon the failure of Congress to overrule that decision during its periodic reconsiderations of the Act. *Sheffield, supra,*

435 U.S. at 132-35.[2] In this case, however, there is not a word in the voluminous legislative history to indicate that Congress ever had any inkling that *Allen* might be construed to extend the scope of §5 to cover the judiciary. The Justice Department reports to the Judiciary Committees of both houses in 1981 and 1982, discussed above, gave no indication that the judiciary might be covered. Its earliest report to Congress on the subject likewise gave no such indication. Hearings on S. 818 et al. before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2d Sess. 665-666 (1970). The extensive oversight hearings of 1971 make no mention of such coverage. Enforcement of the Voting Rights Act: Hearings before Subcomm. No. 4 of the Comm. on the Judiciary, 92nd Cong., 1st Sess. (1971). Congress has repeatedly reviewed voluminous studies prepared by other organizations, none of which suggest §5 covers the judiciary. *The Voting Rights Act: Ten Years After* (U.S. Commission on Civil Rights), reprinted in 1975 House Hearings, *supra,* at 1008-14; D. Hunter, *Federal Review of Voting Changes* (Joint Center for Political Studies, Voter Education Project, lawyers' Committee for Civil Rights Under

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[2]This Court should be aware, however, that the full Congress has not had an opportunity to reconsider the reach of § 5 since the 1970 amendments to the Act. Because the so-called extension of § 5 is accomplished by the amendment of the limitations period in Section 4(a), § 5 itself was not brought to the floor of the House of Representatives in 1975 or 1982, and any attempt to amend § 5 would therefore have been out of order as non-germane. The only time the House has had an opportunity to pass on its view of the *Allen* decision, it adopted a proposal offered by Representative Gerald Ford and endorsed by President Richard Nixon to remove entirely the preclearance requirement. 115 Cong. Rec. 38514-15, 38535-36 (1969). It was the insistence of the Senate alone which insured the survival of *Allen.*

Congressional failure to act did not cause this Court to adhere to its earlier construction of another civil rights statute when convinced of its mistake. *Monell v. Department of Social Services,* 436 U.S. 458 (1978), overruling *Monroe v. Pope,* 365 U.S. 167 (1961). As in *Monell,* the Senate's intransigence in 1970 hardly amounts to a ratification of *Allen.* This Court has made plain that the law can be changed only by action of both houses of Congress and the President. *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983). If this Court remains unconvinced of the propriety of its decision in *Allen,* Congressional acquiescence in that decision can no more change the law than Congressional rejection of executive action.

Law), reprinted in 1975 House Hearings, *supra,* at 1562-69; L. McDonald, *Voting Rights in the South — Ten Years of Litigation Challenging Continuing Discrimination against Minorities* (American Civil Liberties Union), reprinted in 1982 Senate Hearings, *supra,* App. at 695-707. It is impossible to conclude from an exhaustive review of the record that anyone had ever advised Congress that *Allen* might in any way restrict the ability of a State to modify its judicial system.

This does not mean, however, that a State's judicial system is immune from challenge where it is designed to discriminate on the basis of race. This is why the result, though not the reasoning, of *Voter Information Project, Inc., v. City of Baton Rouge,* 612 F.2d 208 (5th Cir. 1980), is entirely correct. In that case, the complaint alleged, "The sole purpose of the present at-large system of election of City Judge is to insure that the white majority will continue to elect all white persons for the purposes of City Judge." *Id.,* at 211. If true, such a purpose violates the Constitution, not because the right to vote has been abridged within the meaning of the Fifteenth Amendment, but because the Fourteenth Amendment forbids all purposefully invidious racial determinations by State. *See, e.g., Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 484-85 (1982). A State can no more rely upon racial considerations in deciding where to put a judicial district than it can in deciding where to put a housing project. *See Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977). The courts of the United States are open and capable of determining whether North Carolina discriminated on the basis of race in its modification of its court system. The Appellants in this case argue only that Congress did not intend to delegate the power to make that decision to the Department of Justice or to the United States District Court for the District of Columbia under §5 of the Voting Rights Act.

A contrary decision by this Court would have staggering implications. Courts have not only territorial jurisdiction, but also subject matter jurisdiction. When a State raises the jurisdictional amount for a given court, thereby withdrawing certain cases from a higher court of general jurisdiction covering a broader geographical area, the voters in that larger area would be deprived of their right to elect the particular judges who were to hear the transferred cases. An individual who is a racial minority

in the county but in a racial majority in the circuit might well prefer to have the higher court continue to hear those cases. An argument could be made, and no doubt will be made, if this Court affirms the District Court's decision, that all such jurisdictional reforms must be submitted to the Justice Department for approval. Indeed, the State would be required to seek approval before requiring its judges to undergo continuing legal education, because that could be considered a new qualification for office. That would pose an egregious problem in those States which still use lay magistrates or justices of the peace. To require a State with an elective judicial system to preclear modifications affecting that system "in even a minor way," *Allen*, 393 U.S. at 566, would constitute a substantial expense and a major inhibition to badly needed judicial reforms.

Congress can have had no such purpose when it adopted the Voting Rights Act of 1965. It can have foreseen no such consequence of *Allen* when it amended the Voting Rights Act in 1970, 1975 and 1982. The record before this Court shows that the Department of Justice has never perceived any such requirement in the Act, nor has any court. This Court should note probable jurisdiction and should reverse the judgment of the District Court.

II. Past changes in North Carolina's judiciary should not be subject to the preclearance requirements of §5 of the Voting Rights Act, in light of the special circumstances of the case.

A. Past representations of the United States Attorney General require an equitable application of §5.

The State of North Carolina seriously contests the District Court's holding that the State must now scuttle numerous legislative enactments relating to its judicial system, some of which have been in effect since 1965, unless the State submits or "unambiguously" resubmits those enactments to the United States Attorney General and obtains their preclearance. Even if submission of the enactments in issue is ultimately held by this Court to be required, the particular circumstances surrounding the present case and surrounding the State's past actions relative to the requirements of §5 present a unique situation and give rise to the need for a special assessment of the situation by this Court.

Already the State has fully discussed the import of cases like *Holshouser v. Scott,* 335 F. Supp. 928 (M.D.N.C. (1971), aff'd, 409 U.S. 807 (1972), to the issues of this case.

The issues examined in *Holshouser* were, of course, different from those presently before the Court; but the reasoning employed by the Court in that case, at a time when considerable confusion existed as to Congress' intended application of the Voting Rights Act, is closely wed to, and is critical to this Court's understanding of, the State's position in the present case.

The special distinction between officials elected to serve in a judicial capacity and those elected to serve in a representative capacity was not only of significance to those concerned with equality of the vote in the numerical sense. The distinction was considered to be more general, and, to some extent, fostered the notion that, anytime an electoral method was scrutinized, the degree of scrutiny had to be somewhat tempered by special considerations if court officials were involved. Simply put, judges were different; they didn't represent people; and, in election matters, the same "rules" didn't apply. That reasoning, for good cause, persists today; but its importance to the present case lies in its prevalence in the late 1960s and early 1970s.

The notion was clearly not foreign to federal officials at that time—certainly not those charged with the interpretation and enforcement of §5. As was the case among officials in jurisdictions covered by the Act, there was confusion and disagreement among federal officials as to Congress' intentions in its enactment of the Voting Rights Act. One prevailing feeling, however, was that §5 was intended to apply only in situations where elections changes related to officials serving in representative capacities, as the Leonard affidavit states. App. at A-13. This is most compellingly demonstrated by the Attorney General's response to a §5 submission of 1967 election law enactments made on February 18, 1971, by Alex K. Brock, Executive Secretary-Director, State Board of Elections. App. at A-48. In response to Brock's submission, David L. Norman, Acting Assistant Attorney General, Civil Rights Division, indicated that no objection would be interposed to the enactments, with the qualification that the Attorney General required further information regarding the enactment of Chapter

1063, Session laws of 1967 (legislation providing for numbered seats in some legislative districts).[3] Norman then concluded his letter as follows:

> "Also, I must advise you that there were several statutes submitted, *such as the changes in the North Carolina Court System, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act. These amendments to existing laws were not reviewed by this Division,* and because Section 5 does not cover an enactment unless it changes in some way the previously existing statute, I have not reviewed those portions of Chapter 163 of the North Carolina Code which were not altered." [Emphasis added.] App. at A-49.

As the Brock affidavit shows, Norman could only have been referring to Chapter 1049, Session Laws of 1967, a part of that submission. App. at A-16. That legislation, indeed, included numerous provisions relating to the administration of the State's court system which in no way related to elections practices or procedures. However, the legislation clearly indicated on its face that it did affect the boundaries of solicitorial districts and terms of solicitors. As indicated by the Hinsdale affidavit, the legislation altered numerous solicitorial districts—districts from which the solicitors were elected. App. at A-11. By present-day standards, nothing else showing, these alterations of district boundaries might well have been thought to constitute a proper item for review by the Attorney General. *See,* 28 C.F.R. 51 at §51.12(e). Yet the Attorney General specifically denoted such changes to be matters not subject to §5 review requirements. Further, the evidence supports the fact that Norman intended for his statement to be taken literally. The affidavit of Jerris Leonard (App. at A-13), who served as Assistant Attorney General, Civil Rights Division, at a time just preceding the Norman correspondence, not only corroborates statements in the Brock affidavit to the effect that compliance with §5 was made difficult by the uncertainty of federal officials as to what the Act intended (App. at A-15), but also indicates that those officials were

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[3]The Norman letter does not indicate by date that it responds to the February 18, 1971, submission, but its reference to Chapter 1063, Session Laws of 1967, and to other 1967 enactments, makes that fact conclusive.

advertant to and influenced by concepts similar to those set out in *Holshouser, supra.* Judicial officers, solicitors and judges, though elected by the people, did not serve the people in a representative capacity.[4] That being the case, the Attorney General apparently felt that matters pertaining to the method of electing them were not within the ambit of §5.

It is the Norman letter which is the cause of the State's present dilemma. The record in this case is replete with evidence of the State's efforts to comply with what it perceived to be the requirements of §5 since the enactment of the Voting Rights Act. The Brock affidavit, filed by the State, indicates that he personally made every effort to satisfy the Act's requirements. Throughout 1966 and into early 1967, he travelled frequently to Washington and met with officials in the Civil Rights Division, hand delivering matters he thought subject to review. App.at A-15.

In 1970, however, a three-judge court in *Clayton v. North Carolina State Board of Elections,* 317 F. Supp. 915 (E.D.N.C. 1970), ruled his early efforts to comply with §5 insufficient. Plaintiffs in that case alleged that a 1969 legislative enactment, essentially prohibiting electioneering within 500 feet of polling places in certain counties covered by §5, had never been submitted to the Attorney General, nor had an action been commenced by the State or any of its political subdivisions in the United States District Court for the District of Columbia, as provided by §5. An affidavit of Brock, submitted in that action by the State to prove submission, indicated that he had either mailed or hand-delivered to the Attorney General copies of the North Carolina Election Laws in their entirety before and after the 1967 and 1969 sessions of the General Asembly. Evidence, however, was introduced by Plaintiffs showing that the United States Department of Justice had no evidence of the submissions on file.

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[4] *Holshouser* equated judges and prosecutors, as far as election matters were concerned, quoting *Stokes v. Fortson,* 234 F. Supp. 575 (N.D. Ga. 1964):

> Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not tc espouse the cause of a particular constituency.

335 F. Supp. at 931.

The District Court determined the enactment in issue to be unenforceable, since no evidence of its submission and preclearance could be found in the United States Department of Justice files.

Following the ruling in *Clayton*, Brock resorted to written submissions exclusively following a format for which United States Department of Justice officials expressed a preference and routinely made written submissions of all legislation which he thought to be covered by § 5. App. at A-15.

Submissions by Brock of changes relating to the election of the State's judges, however, were sporadic. Chapter 262, Session Laws of 1965, was not submitted as a separate enactment, but its provisions were included in Chapter 775, Session Laws of 1967, which was submitted in 1971. Chapter 997, Session Laws of 1967, was not submitted separately, but its provisions were included in Chapter 1190, Session Laws of 1969, which was also submitted in 1971.[5] The State concedes that neither Chapters 1119, 1130, and 1238, Sessions Laws of 1977 nor Chapter 1109, Session Laws of 1983, have ever been submitted to the Attorney General; no action regarding them has ever been filed in the United States District Court for the District of Columbia. Yet the Brock Affidavit indicates that his actions were greatly influenced by the Norman letter of 1971.[6] Largely as a result of the Norman letter, he came to view changes in methods of election of North Carolina judges as items not required by §5 to be submitted to the Attorney General.

To the extent that North Carolina failed, after its submissions of Chapter 775, Session Laws of 1967, and Chapter 1190, Sessions Laws of 1969 in 1971, to supplement earlier submissions by later making specific submissions of Chapter 262, Session laws of 1965 and Chapter 997, Session Laws of 1967, what was its

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[5] Defendants contend that these two submissions, all considered, were adequate, especially the submission of Chapter 262. Chapter 775 contained its provisions and indicated clearly that it embodied a total rewrite of Chapter 163. App. at A-16.

[6] It is of no small significance that the letter postdated the decision in *Allen v. Board of Elections, supra*, requiring approval of state enactments altering election laws "in even a minor way."

incentive to do so, and upon what should the State have founded a perception that it should do so, in light of the Attorney General's gratuitous instruction that submission was not required? The State has never submitted Chapters 1119, 1130, and 1238, Session Laws of 1977 or Chapter 1109, Session laws of 1983, but what should have influenced it to submit those laws?

If jurisdictions covered by the Act are to escape continued treatment which transcends the inequitable, this court must acknowledge in a meaningful way that officials in jurisdictions covered by § 5 give great weight to the manner in which federal officials interpret that provision. The familiarity of those officials with the Voting Rights Act and the forces behind its inception has even caused their construction of it to be weighed heavily by this court:

> "...Given the central role of the Attorney General in formulating and implementing §5, this interpretation of its scope is entitled to particular deference. *United States v. Board of Cmm'rs. of Sheffield,* 435 U.S., at 131, 98 S. Ct., at 979; *Perkins v. Matthews,* 400 U.S., at 391, 91 S. Ct., at 438. *See Georgia v. United States,* 411 U.S., at 536-539, 93 S. Ct., at 1708-1710."

Doughtery County, Georgia, Board of Education, et al., v. White, 439 U.S. 32, 39-40 (1978).

North Carolina, in 1971, received the Attorney General's opinion regarding changes in election laws relating to the judiciary; it has never received a retraction. The Voting Rights Act has never been held to apply retroactively, *See Hereford Independant School Dist. v. Bell,* 454 F. Supp. 143 (D.C. Tex. 1978). Even if the present case leads to a seminal holding requiring the submission of all election law changes affecting the State's judges and district attorneys, then that holding, in light of the particular facts surrounding this controversy, should not result in a virtual retroactive application of § 5 to the enactments in issue. At most, the District Court's ruling should only have had prospective effect. Reliance on past representations made by the Attorney General should count for something.

B. At least portions of the enactments in issue have been submitted and approved.

If this Court determines that the facts of this case in no way diminish the requirements that North Carolina submit Chapters 1119, 1130, and 1238, Session Laws of 1977 and Chapter 1109,

Session Laws of 1983, the Court should still find that the State has satisfied its statutory obligation to submit Chapter 262, Session Laws of 1965 and Chapter 997, Session Laws of 1967. True, *McCain v. Lybrand*, 465 U.S. 236 (1984), is conclusive in its requirement that any covered jurisdiction submit all changes in its election practices to the Attorney General in a clear and unambiguous fashion. The requirements of the decision are as stringent as it recognizes the preclearance process to be. But even *McCain* implicitly recognizes that peculiar facts surrounding a particular case might provide the basis for a different holding:

> "To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction *in the circumstances of this case.* (Emphasis added.) 465 U.S. at 39-40.

North Carolina's actions with respect to the enactments in issue can in no way be equated with the "attempts to circumvent the protections afforded by the Act" against which *McCain* intended to guard. The reasons for the State's past actions have been revealed. This Court should note probable jurisdiction, in light of those reasons.

CONCLUSION

For these reasons heretofore discussed, the Court should note probable jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three (3) copies of the foregoing Jurisdictional Statement upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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This the 6th day of December, 1985.

JAMES WALLACE, JR.
Assistant Attorney General
State of North Carolina